STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2014
v	No. 315237 Berrien Circuit Court
DWAYNE KEITH LAWSON, Defendant-Appellant.	LC No. 2012-016281-FH

Before: CAVANAGH, P.J., and OWENS and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for first-degree retail fraud, MCL 750.356c, and deactivating a theft detection device, MCL 750.360a(1)(e). We affirm.

I. BACKGROUND

Defendant's convictions stem from two separate incidents that occurred at the same Wal-Mart store. The store's video surveillance showed that on the night of September 7, 2012, a man entered the store, selected a shopping cart, and then selected a large plastic tote from a store shelf and placed it in his shopping cart. The man pushed his cart throughout the store for approximately two hours, selecting numerous items that were for sale and placing them inside the tote in his shopping cart. At approximately 1:25 a.m. on September 8, 2012, with the lid to the tote closed and no merchandise visible in his cart, the man pushed his cart through an empty checkout line and out of the store without paying for any merchandise. On the afternoon of September 8, 2012, Michael Kirby, one of the store's loss-prevention agents, arrived at the store and reviewed the surveillance video from the previous night.

On September 9, 2012, Kirby and fellow loss-prevention agent, Joshua McAndrew, were working at the store. At approximately 6:00 p.m. on September 9, 2012, defendant entered the store, selected a shopping cart, and pushed the cart throughout the store, selecting merchandise and placing it in the cart. At some point, defendant selected a bottle of liquor, which had a theft detection device on it. Thereafter, at approximately 6:45 p.m., McAndrew was walking throughout the store wearing plain civilian clothes when he noticed defendant select a large tote and place it in his shopping cart on top of the merchandise he had already selected. McAndrew recognized defendant as the suspect from the September 7, 2012 surveillance photograph, and he began following defendant throughout the store. McAndrew observed defendant transfer merchandise from his cart into the tote. The record also supports that defendant removed the

theft detection device from the liquor bottle and discarded part of the device on a nearby counter. Meanwhile, McAndrew radioed Kirby and notified him of the situation. Kirby located defendant and also recognized him as the suspect from the September 7, 2012 surveillance video. Kirby called the police and reported a theft in progress.

Thereafter, McAndrew and Kirby observed defendant push his shopping cart containing the tote through an empty checkout line and past all points of sale. Defendant then entered a bathroom in the front of the store. By the time defendant emerged from the bathroom, the police had arrived at the store and a deputy was positioned at each of the store's two public entrances. Defendant pushed his shopping cart toward one of those doors. However, defendant did not exit the store, but instead turned around and pushed his shopping cart to the store's electronics department, where he discarded it with the tote still inside. Defendant then exited the store without any merchandise. Two deputies approached defendant in the store parking lot and asked him to come back into the store for questioning, and defendant acquiesced. A search of defendant's person revealed that he only possessed approximately $6 in cash. Defendant waived his *Miranda*[1] rights and spoke with Deputy Chad Frantz's. Defendant stated that he had been in the store on the night of September 7, 2012, in order to purchase brats and buns. When Deputy Frantz questioned defendant about pushing a cart with a tote out of the store on the night of September 7, 2012, defendant stated that he did not remember the incident. Defendant gave similar responses to Deputy Frantz subsequent questions about the September 9, 2012 incident. The police arrested defendant. Meanwhile, McAndrew retrieved the tote from the shopping cart that defendant had left in the store earlier that evening. Among the items found inside the tote, were the liquor bottle and pieces of a severed theft detection device. McAndrew scanned each item of merchandise and determined that the total pre-tax sale cost was $631.72.

Defendant was charged with one count of first-degree retail fraud and one count of deactivating a theft detection device. At trial, Kirby identified defendant as the same person who stole merchandise from the store on September 7, 2012 and who engaged in the previously described behavior on September 9, 2012. Kirby also testified that from reviewing the September 7, 2012 surveillance video, he was able to identify many of the items stolen that night and determine the individual prices of those items, the total amount adding up to $656.91. The surveillance videos and photographs from the September 7 and 9, 2012 incidents were admitted into evidence and shown to the jury. The jury found defendant guilty as charged.

II. SUFFICIENCY OF EVIDENCE

On appeal, defendant first argues that the prosecution failed to present sufficient evidence to sustain his conviction of first-degree retail fraud. We disagree. We review de novo defendant's claim of insufficient evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of

[1] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Moreover, "when reviewing claims of insufficient evidence, this Court must make all reasonable inferences and resolve all credibility conflicts in favor of the jury verdict." *People v Solmonson*, 261 Mich App 657, 661; 683 NW2d 761 (2004). Under MCL 750.356c(1)(b), a person is guilty of first-degree retail fraud if "[w]hile a store is open to the public," he "steals property of the store that is offered for sale at a price of $1,000.00 or more."

Defendant raises three separate challenges to the sufficiency of the evidence. Defendant first contends that there was insufficient evidence to prove that he was the person who stole from the store on the night of September 7, 2012. Identity is a requisite element of every offense. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). Deputy Frantz testified that defendant admitted to being in the store on the night of September 7, 2012. Kirby testified that after reviewing the September 7, 2012 surveillance video, he was able to identify defendant when defendant returned to the store on September 9, 2012. McAndrew testified that from a September 7, 2012 surveillance photograph, he was able to recognize defendant when he saw defendant in the store on September 9, 2012. The September 7, 2012 surveillance video and photographs were shown to the jury. Viewing "the evidence in a light most favorable to the prosecution[,]" *Wolfe*, 440 Mich at 515, and "mak[ing] all reasonable inferences . . . in favor of the jury verdict[,]" *Solmonson*, 261 Mich App at 661, we find that the prosecution presented sufficient evidence establishing defendant's identity as the person who stole merchandise from the store on the night of September 7, 2012.

Under his sufficiency of the evidence challenge, defendant argues that the trial court should have suppressed in-court identifications because the "identification procedures used in this case" were impermissibly suggestive under the law regarding police lineups. Defendant concedes, however, that there was no lineup in this case and that none of the identification procedures were arranged by law enforcement officers. Moreover, the due process protection against impermissibly suggestive identification procedures does not apply where the "suggestive circumstances were not arranged by law enforcement officers." *Perry v New Hampshire*, ___US___; 132 S Ct 716, 720-721, 721 n 1; 181 L Ed 2d 694 (2012). Thus, we do not find that there was insufficient identification evidence on the basis that the challenged identification procedures were impermissibly suggestive. Defendant also asserts that the September 7, 2012 surveillance video and photographs were not of sufficient quality for identification. Kirby testified that the surveillance video was clear enough to allow him to subsequently identify defendant as the September 7, 2012 perpetrator. Moreover, the jurors observed the surveillance video and photographs and were able to make their own determinations regarding the quality and reliability of that evidence. It is for the jury, not this Court, to decide how much weight or credibility to give the identification evidence the prosecution presented. See *Wolfe*, 440 Mich at 515.

Defendant next contends that there was insufficient evidence to prove that he intended to steal store merchandise on September 9, 2012. "[B]ecause it can be difficult to prove a defendant's state of mind on issues such as knowledge and intent, minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). McAndrew and Kirby both testified that defendant's behavior on September 9, 2012 was

consistent with shoplifting. The evidence showed that defendant concealed various items of store merchandise inside a tote and then pushed his cart and the tote past all points of sale without paying for any merchandise. This behavior mirrored defendant's behavior on the night of September 7, 2012, when he left the store without paying for any merchandise. Moreover, the evidence supported that defendant removed a theft detection device from the liquor bottle that was inside his tote, which suggested that he intended to leave the store without paying for the merchandise inside the tote. Furthermore, defendant only possessed about $6 at the time, which suggested he did not intend to pay for the merchandise he collected, which exceeded $600 in price. The foregoing evidence supports the jury's conclusion that defendant intended to steal the items he collected on September 9, 2012. See *id*; *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

Finally, defendant contends that there was insufficient evidence to prove that he stole merchandise priced at $1,000 or more. Defendant's argument is premised on two separate contentions: (1) it was improper for the jury to aggregate the value of the items stolen September 7, 2012 and September 9, 2012; and (2) there was insufficient evidence establishing the requisite value of items stolen on the night of September 7, 2012. Regarding defendant's first contention, MCL 750.356c(3) provides: "The values of the difference in price, property stolen, or money or property obtained or attempted to be obtained in separate incidents pursuant to a scheme or course of conduct within any 12-month period may be aggregated to determine the total value involved in the offense under this section." "[T]he intent of the Legislature governs the interpretation of legislatively enacted statutes. The intent of the Legislature is expressed in the statute's plain language. When the statutory language is plain and unambiguous, the Legislature's intent is clearly expressed, and judicial construction is neither permitted nor required." *People v Lewis*, 302 Mich App 338, 341; 839 NW2d 37 (2013) (citations and quotations omitted). MCL 750.356 does not define the phrase "scheme or course of conduct." "[U]ndefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art." *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007). See also MCL 8.3a.

Here, the evidence supported the existence of a "scheme or course of conduct" under the plain meaning of those terms. The two incidents occurred fewer than two days apart from each other and at the same Wal-Mart store. In both instances, defendant entered the store wearing a white baseball hat, obtained a shopping cart, placed a large tote in his shopping cart, concealed store merchandise inside the tote, and pushed his cart and the tote through an empty checkout line without paying for any merchandise. In both incidents, defendant was in the store for longer than an hour, during which time he frequently moved away from his shopping cart before returning to it. Under the plain and ordinary meaning of "scheme" and "course of conduct," the evidence showed that defendant exhibited a common plan, design, or course of action to perpetuate theft during the two incidents. See MCL 8.3a; *Thompson*, 477 Mich at 151.

Regarding defendant's second contention, we find that there was sufficient evidence to establish the requisite value of items stolen on the night of September 7, 2012. It was uncontested that the value of the items stolen on September 9, 2012 was $631.72. Thus, in order to meet the "$1,000.00 or more" threshold, defendant must have stolen at least $368.28 worth of merchandise on the night of September 7, 2012. Kirby testified that after watching the September 7, 2012 surveillance video, he was able to identify various items that defendant stole

and determine the aisles from which they were stolen. He then examined the corresponding aisles, verified what items were missing from the respective aisles, and determined the price for the missing items. The total of the identifiable items stolen was $656.91. Viewing "the evidence in a light most favorable to the prosecution[,]" *Wolfe*, 440 Mich at 515, and "mak[ing] all reasonable inferences . . . in favor of the jury verdict[,]" *Solmonson*, 261 Mich App at 661, we find that the prosecution presented sufficient evidence that the merchandise defendant stole on the night of September 7, 2012 was valued at least $368.28.

III. HEARSAY

Defendant next argues that the trial court erred by admitting Deputy Frantz's testimony regarding the statements defendant made to Frantz on September 9, 2012, because those statements were inadmissible hearsay and any probative value was outweighed by unfair prejudice under MRE 403. We disagree. Defendant raised his hearsay challenge at trial, and thus, preserved that argument for appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). However, defendant did not raise a MRE 403 objection at trial and, thus, did not preserve that claim of error for appeal. *Id*. We review defendant's preserved claim of error regarding hearsay for an abuse of discretion. *Id*. "A preserved error in the admission of evidence does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks and citation omitted). We review defendant's unpreserved claim of error regarding unfair prejudice for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, defendant must show that an obvious error occurred and "that the error affected the outcome of the lower court proceedings." *Id*.

"Hearsay is 'a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.' MRE 801(c). Generally, hearsay is inadmissible unless it comes within an exception to the hearsay rule." *People v Dendel*, 289 Mich App 445, 452; 797 NW2d 645 (2010) (internal citation omitted). However, MRE 801(d)(2) provides that a statement is not hearsay if it "is offered against a party and is [] the party's own statement." MRE 801(d)(2)(A). Here, defendant's September 9, 2012 statements to Deputy Frantz were offered against defendant to show that he was in the store on the night of September 7, 2012, and that he was not forthright with the police regarding the September 7 and 9, 2012 incidents, which evidenced a consciousness of guilt. See *People v Unger*, 278 Mich App 210, 225-226; 749 NW2d 272 (2008). Thus, the trial court did not abuse its discretion by admitting Deputy Frantz's testimony under MRE 801(d)(2)(A).

Defendant also has not shown that the admission of Deputy Frantz's testimony was plain error in light of MRE 403. MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403.

> All relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded. Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury. This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the

> merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock. [*People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005) (citations and quotations omitted).]

Deputy Frantz's challenged testimony was relevant under MRE 401, which provides "a broad definition" of relevance that allows for "the admission of evidence that is helpful in throwing light on any material point." *People v Brown*, 294 Mich App 377, 383; 811 NW2d 531 (2011). As discussed above, the challenged testimony was highly probative of defendant's identity as the September 7, 2012 perpetrator and probative to show his consciousness of guilt. *Unger*, 278 Mich App at 225-226. Defendant does not explain how the challenged evidence was unfairly prejudicial, other than to assert that the prosecution only offered Deputy Frantz's testimony to make defendant "look foolish or to make him look guilty because he didn't have a good explanation." On the record before us, the challenged evidence did not have a tendency to inject considerations extraneous to the case and was not unfairly prejudicial. *McGhee*, 268 Mich App at 613-614. Thus, we conclude that the record before us does not support that the probative value of Deputy Frantz's challenged testimony was substantially outweighed by the danger of unfair prejudice. MRE 403; *McGhee*, 268 Mich App at 613-614.

IV. JURY INSTRUCTIONS

Defendant also argues that the trial court gave erroneous jury instructions. At trial, however, defense counsel affirmatively approved of the trial court's jury instructions. Thus, defendant has waived review of any error regarding the jury instructions. *People v Kowalski*, 489 Mich 488, 505 n 28; 803 NW2d 200 (2011); *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Nevertheless, we reviewed defendant's claims of instructional error and find them to be meritless.

V. PROSECUTORIAL MISCONDUCT

Defendant next raises multiple claims of prosecutorial misconduct, which he asserts entitle him to a new trial. We disagree. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). "[A]llegations of prosecutorial misconduct are considered on a case-by-case basis, and the reviewing court must consider the prosecutor's remarks in context." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). A defendant pressing an unpreserved claim of prosecutorial misconduct "must show a plain error that affected substantial rights, and the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Parker*, 288 Mich App 500, 509; 795 NW2d 596 (2010).

Defendant first argues that the prosecutor violated the Michigan Rules of Evidence "by directly arguing propensity" during her closing argument when she told the jurors they could infer defendant's intent to steal on September 9, 2012 from the fact he stole merchandise from the store on the night of September 7, 2012. The Michigan Rules of Evidence govern the admissibility of evidence, and a prosecutor's statements during closing arguments are not evidence. See *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 364; 503 NW2d 915 (1993); CJI2d 3.5(5) ("The lawyers' statements and arguments [and any commentary] are

not evidence."). Thus, the prosecutor's statements during her closing argument did not violate any rule of evidence. Moreover, we note that MRE 404(b)(1) allows the prosecutor to use other acts evidence for the purpose of establishing intent. "Prosecutors are typically afforded great latitude regarding their arguments" and "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236. Here, the prosecutor's argument called for a reasonable inference and did not ask the jury to consider the evidence of defendant's September 7, 2012 theft for an improper purpose. Defendant has not shown that the prosecutor's argument regarding the September 7, 2012 incident constituted plain error affecting his substantial rights. *Parker*, 288 Mich App at 50.

Defendant next argues that the prosecutor committed misconduct by inviting the jury to speculate that he entered the store bathroom on September 9, 2012 as a tactic to avoid being caught shoplifting. "A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007) (internal citation omitted). Here, the prosecutor's challenged remarks were reasonable inferences arising from the evidence that was consistent with the prosecution's theory of the case. By the time defendant entered the store bathroom, the record indicated that he had removed a theft detection device from store merchandise and had concealed merchandise inside a tote that he took through an empty checkout line without paying for any of the merchandise therein. McAndrew and Kirby testified that defendant's conduct on September 9, 2012 was consistent with that of a shoplifter. Moreover, the record supported that defendant exhibited similar behavior on the night of September 7, 2012, when he actually left the store without paying for the merchandise he had collected. Evaluating the prosecutor's challenged remarks in light of the facts of the case, her argument regarding defendant's trip to the bathroom was a reasonable inference from the evidence. *Id*. Given that "[p]rosecutors are typically afforded great latitude regarding their arguments" and "are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case," *Unger*, 278 Mich App at 236, defendant has not shown that the prosecutor plainly erred by arguing that he entered the store bathroom as a tactic to avoid being caught for shoplifting. *Parker*, 288 Mich App at 509.

Defendant's final prosecutorial misconduct argument is that the prosecutor misstated the law regarding aggregating the value of stolen property under MCL 750.356c(3). The prosecutor told the jury, "one of the instructions the judge is going to give you is that when you're looking at the value of the property you can combine any activity within a 12-month period." The prosecutor never stated that under MCL 750.356c(3), the jury may only aggregate the value of property stolen pursuant to a scheme or course of conduct. However, after the parties' closing arguments, the trial court properly instructed the jury that in order for it to aggregate the value of property stolen on September 7, 2012 and September 9, 2012, it must find that the separate incidents were part of "a scheme or course of conduct within a 12-month period." MCL 750.356c(3). The trial court also instructed the jurors that they "must take the law as I give it to you. If a lawyer said something different about the law, follow what I say. . . . You must take all my instructions together as the law you are to follow." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not shown that any misstatement of the

law on the part of the prosecutor affected the outcome of the proceedings and warrants reversal. *Mesik (On Reconsideration)*, 285 Mich App at 542.

VI. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his trial counsel was ineffective for multiple reasons. We disagree. Our review of defendant's unpreserved claim of ineffective assistance of counsel is limited to plain errors apparent in the record. *People v Snider*, 239 Mich App 393, 420, 423; 608 NW2d 502 (2000). "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Yost*, 278 Mich App at 387. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *Ericksen*, 288 Mich App at 201.

Defendant first asserts that defense counsel was ineffective for failing to challenge the September 7, 2012 identification evidence. Defendant specifically contends that defense counsel should have retained an expert witness on identification. As previously discussed, the prosecution presented ample evidence proving that defendant was the September 7, 2012 perpetrator, including defendant's admission to Deputy Frantz that he was in the store that night, the September 7, 2012 surveillance video and photographs, and the testimonies of Kirby and McAndrew. Defense counsel was not ineffective for "[f]ailing to advance a meritless argument." *Id*. Moreover, defense counsel's decision not to retain an expert witness to challenge the prosecution's identification evidence was "a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Ultimately, given that defense counsel possessed "wide discretion in matters of trial strategy," *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), defendant has not "overcome the strong presumption that his counsel's" decision not to challenge the September 7, 2012 identification evidence "constituted sound trial strategy under the circumstances," *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant also asserts that defense counsel was ineffective for not challenging whether the September 7 and 9, 2012 incidents were part of a "scheme" and "course of conduct" regarding aggregating the value of the stolen items. As discussed under our analysis of defendant's challenge to the sufficiency of the identification evidence, the record before the jury supported that defendant committed the September 7 and 9, 2012 incidents pursuant to a scheme or course of conduct under MCL 750.356c(3). The two incidents occurred fewer than two days apart and at the same Wal-Mart store, and both incidents involved substantially similar conduct on the part of defendant to perpetrate theft of merchandise priced at approximately $650. Given that defense counsel is not ineffective for "[f]ailing to advance a meritless argument," *Ericksen*, 288 Mich App at 201, and counsel possesses "wide discretion in matters of trial strategy," *Odom*, 276 Mich App at 415, defendant has not "overcome the strong presumption that his counsel's" decision not to challenge whether the two incidents were part of a scheme or course of conduct "constituted sound trial strategy under the circumstances," *Toma*, 462 Mich at 302.

Lastly, defendant asserts that defense counsel was ineffective for not objecting to the jury instruction on flight because the evidence did not support such an instruction. It was improper for the trial court to instruct the jury on flight given there was no evidence that defendant fled the

scene or resisted authorities or store personnel. On the contrary, defendant responded to law enforcement and willingly returned back to the store to speak with them. Although there was evidence that defendant discarded his shopping cart and thereafter immediately left the store, "mere departure from the scene is insufficient to give rise to 'flight' in the legal sense." *People v Hall*, 174 Mich App 686, 691; 436 NW2d 446 (1989). Instructional error, nevertheless, does not affect the validity of a verdict unless defendant can show that it was more probable than not that the error was outcome determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). Even though counsel's failure to object to the trial court's jury instruction on flight was error, defendant has not shown "that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id*. The trial court instructed the jurors to base their verdict solely on the evidence before them, which did not include the trial court's instructions; and the prosecution presented ample evidence of defendant's guilt.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald S. Owens
/s/ Cynthia Diane Stephens